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No. 89-1281

In the Supreme Court of the United States

OCTOBER TERM, 1989

HERNAN BOTERO MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's mail fraud convictions should be vacated on collateral attack in light of *McNally* v. *United States*, 483 U.S. 350 (1987).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 891 F.2d 905 (Table). The opinion of the district court (Pet. App. A2-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1989. The petition for a writ of certiorari was filed on February 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18

U.S.C. 371; one count of falsifying material facts within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001; and five counts of mail fraud, in violation of 18 U.S.C. 1341. His conviction was upheld on direct appeal. *United States* v. *Botero*, 808 F.2d 59 (11th Cir. 1986) (Table), cert. denied, 483 U.S. 1020 (1987). In 1987, this Court held in *McNally* v. *United States*, 483 U.S. 350, that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Pursuant to 28 U.S.C. 2255, petitioner then moved to vacate his mail fraud convictions in the United States District Court for the Southern District of Florida. The district court denied the motion. Pet. App. A2-A5. The court of appeals affirmed. *Id.* at A1.

1. The evidence at petitioner's trial is detailed in the government's brief filed in the court of appeals. Gov't C.A. Br. 6-19. Briefly, co-conspirator Dolores Eirin was an officer of the Landmark First National Bank of Fort Lauderdale, Florida. In October 1979, petitioner advised Eirin that he wished to make large deposits of cash at the bank without the bank's filing the required Currency Transaction Reports (CTRs) with the Internal Revenue Service. Eirin recruited co-conspirators Alan Campbell and Gary Dodson, both officers at the bank, to participate in the money laundering operation.

Petitioner subsequently met with Campbell and Dodson and explained that there was a "product" originating in Colombia that he imported to the United States and sold for cash. Petitioner stated that he wanted the bank to convert the cash proceeds from his sale of the "product" into Colombian pesos and to transfer it to Colombian banks without reporting the transactions to governmental authorities. Petitioner advised Campbell and Dodson that they could expect to handle about $400,000 in cash each banking day,

and he promised them and Eirin 3/4 of one percent of the funds that they handled.

To facilitate the scheme, petitioner opened five accounts at the bank in the names of fictitious customers. During 1980, petitioner, working through a number of confederates, laundered more than $55 million through those five accounts. The pattern of operation throughout the period remained much the same. Couriers would regularly arrive at the bank with large amounts of cash for deposit. After each deposit, Campbell, Dodson, or Eirin would prepare a CTR for the files (in order to mislead the bank) and would thereafter destroy the original copy instead of sending it to the Internal Revenue Service. They would then transfer the cash deposits to other banks by means of wire transfers or cashier's checks.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Subsequently, in *Carpenter* v. *United States*, 484 U.S. 19 (1987), this Court made clear that the property protected by the mail fraud statute includes intangible, as well as tangible, property, and upheld the wire fraud conviction of the writer of a column for the Wall Street Journal who traded on his knowledge of what the column would say. Thereafter, petitioner moved to vacate his mail fraud convictions on the ground that they had been based on a scheme to conceal information from the Internal Revenue Service, which, he contended, was not a property interest within the meaning of *McNally* and *Carpenter*.

The district court denied relief. Pet. App. A2-A5. The court found that "the information which the Internal Revenue Service was deprived of (i.e., information con-

tained within the CTR form and collected for 'use [in] criminal, tax and regulatory investigations and proceedings')" was property under *Carpenter*. *Id.* at A3-A4. Since "an intangible property loss is sufficient to support the 'deprivation of property or money' requirement in mail fraud cases," the court declined to vacate petitioner's mail fraud convictions because "such loss was both alleged and proven." *Id.* at A4.

3. The court of appeals affirmed without issuing an opinion. Pet. App. A1.

ARGUMENT

As an initial matter, petitioner ignores the fact that the standard of review on collateral attack under 28 U.S.C. 2255 is more stringent than the standard that applies when a defendant challenges his conviction on direct appeal. This Court made clear in *Davis* v. *United States*, 417 U.S. 333, 346 (1974), that a change in the substantive law such as the change made by *McNally* warrants collateral relief only if, as a result of the change in the law, a defendant's conviction could be said to be a "miscarriage of justice." Consequently, petitioner is entitled to collateral relief from his mail fraud convictions only if he showed "that under no possible view of his conduct was he guilty of a federal crime." *United States* v. *Angelos*, 763 F.2d 859, 861 (7th Cir. 1985); see also *Bateman* v. *United States*, 875 F.2d 1304, 1306-1307 (7th Cir. 1989).

1. Petitioner's contention (Pet. 7-10, 13-14) that the decisions of the courts below are inconsistent with this Court's decisions in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), is without merit. The defendants in *McNally* were charged with and convicted of mail fraud on the theory that they had engaged in a scheme to deprive the citizens of Kentucky

of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights," this Court reversed. *McNally*, 483 U.S. at 360. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *Ibid.* All that the jury in *McNally* had to find to convict, as the Court subsequently noted in *Carpenter*, was that Kentucky had been deprived of the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute." *Carpenter*, 484 U.S. at 25.[1]

In *Carpenter*, this Court made clear that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." 484 U.S. at 25. Holding that a scheme to trade on an employer's confidential business information was within the reach of the mail and wire fraud statutes, the Court reiterated that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* at 27.

In this case, petitioner's mail fraud convictions are not based on a scheme to deprive his employer of the intangible right to his honest and faithful service. Rather, petitioner's convictions are based on a money laundering scheme to evade the CTR reporting requirements. Petitioner's con-

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[1] Congress recently amended the federal fraud statutes to provide that "a 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

tention that his convictions are invalid under *McNally* and *Carpenter* rests on the claim (Pet. 8-14) that the Internal Revenue Service had no property interest in the information about financial transactions provided in CTRs. That claim, however, overlooks the fact that "[t]he entire purpose of the CTR filing is to leave a 'paper trail' so the IRS will be able to ascertain if taxes have been paid on large sums of money which move in interstate commerce, whether legally or illegally." *United States* v. *Herron*, 825 F.2d 50, 56 (5th Cir. 1987). Just as the confidential business information in *Carpenter* was of economic value to the Wall Street Journal, the information provided in the CTR has specific and concrete economic value to the Internal Revenue Service for the purpose of assessing and collecting taxes. The IRS's economic interest in the information in CTRs for that purpose constitutes a "property interest" at least as readily cognizable as the interest at issue in *Carpenter*.[2]

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[2] Petitioner argues (Pet. 13-14) that the information in CTRs cannot be considered a "property interest" under *Carpenter* because it does not have all of the attributes of confidential business information referred to by the Court in *Carpenter*. The discussion upon which petitioner relies, however, merely described the confidential information in that case. See *Carpenter*, 484 U.S. at 26-27. That discussion in *Carpenter* does not require that all information having economic value to the victim be of the same nature to be considered a "property interest." See *United States* v. *Grossman*, 843 F.2d 78, 86 (2d Cir. 1988), cert. denied, 109 S. Ct. 864 (1989).

Petitioner also contends (Pet. 10-13) that the decisions of the courts below conflict with this Court's discussion of the CTR recordkeeping and reporting requirements in *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974), because "[n]owhere in the discussion by this Court is there any basis for an inference that the information itself constitutes property belonging to the United States." There is no merit to that contention. In that case, the Court rejected a variety of constitutional attacks on the CTR recordkeeping and reporting requirements. Since that case was decided 13 years before *McNally*, the Court had no occasion

Even if the IRS has no cognizable property interest in the *information* provided in CTRs, viewed in the abstract, petitioner's money laundering scheme plainly deprived the IRS of the taxes due on his income from the sale of his "product" in the United States. While the indictment did not specifically allege that petitioner deprived the IRS of taxes due, the indictment, read as a whole, charges that petitioner engaged in a scheme to defraud the IRS of taxes through the concealment of more than $55 million, with the failure to file CTRs being merely one of the means through which the income was concealed. Significantly, the jury instructions required the jury to find that the purpose of the scheme was to defraud the victim of money or property.[3] Accordingly, since petitioner's money laundering scheme plainly deprived the IRS of taxes due and since the jury necessarily found that an overall object of the scheme was the evasion of taxes, *McNally* does not require that petitioner's mail fraud convictions be overturned on collateral attack. Cf. *United States* v. *Bucey*, 876 F.2d 1297, 1309-1310 (7th Cir.) (upholding, on direct appeal, a mail fraud conviction based on a scheme to defraud the government of income taxes), cert. denied, 110 S. Ct. 565 (1989); *United States* v. *Porcelli*, 865 F.2d 1352 (2d Cir.) (upholding, on direct appeal, a mail fraud conviction based on a scheme to defraud a state government of sales taxes), cert. denied, 110 S. Ct. 53 (1989).

2. Nor is there merit to petitioner's contention (Pet. 20-24) that review is warranted because the decision of the

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to consider whether the IRS had a "property interest" in the information reported in CTRs for purposes of the mail and wire fraud statutes.

[3] The district court instructed the jury that "[t]he words 'scheme' or 'artifice' to defraud include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived." Gov't C.A. Br. 42.

court below conflicts with *United States* v. *Herron*, 825 F.2d 50 (5th Cir. 1987), and *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987). To be sure, in those cases the Fifth and Seventh Circuits both concluded after *McNally* that a scheme to avoid filing CTRs was a scheme to defraud the the government of "intangible rights" in data rather than a scheme to deprive the government of money or property. Since both *Herron* and *Gimbel* were decided before *Carpenter*, however, neither the Fifth nor the Seventh Circuit considered whether the economic value of CTR information to the IRS for the purpose of assessing and collecting taxes gives rise to a property interest like that of the Wall Street Journal in its confidential business information. Moreover, both *Herron* and *Gimbel* were decided on direct appeal rather than on collateral attack. Furthermore, unlike in this case, the jury instructions in *Herron* and *Gimbel* did not require the juries to find that the government had been deprived of money or property. *Herron*, 825 F.2d at 58 ("[i]t is also important to note that the jury instructions in this case did not require the jury to find that the United States had been defrauded of money or property by the defendants"); *Gimbel*, 830 F.2d at 627 ("[t]he relevant fact in both [*McNally* and this case] is that the jury was not required to find that the scheme resulted in the government being deprived of money or property").[4]

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[4] Nor is review warranted on account of a conflict with any of the other cases petitioner cites. See Pet. 14-19. The decision in *United States* v. *Grossman*, *supra*, supports the decision below. In that case, the Second Circuit *upheld* the mail fraud conviction of a law firm associate who directed a stock options trading scheme using confidential information entrusted to the law firm by one of its clients. The Second Circuit concluded that the law firm had a property interest in the confidential information because maintaining the confidentiality of the information directly affected the law firm's economic interest in protecting its business reputation and its ability to attract clients. 843 F.2d at 85-86.

The issue whether a money laundering scheme to evade the CTR reporting requirements involves a scheme to deprive the IRS of "money or property" under the mail fraud statute is not likely to have any continuing importance. After petitioner was convicted, Congress enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. That Act, which totally revised prior law, specifically imposes criminal liability for causing a financial institution to fail to file a CTR, as well as for structuring deposits for the purpose of evading the reporting re-

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The critical fact in both *Carpenter* and *Grossman*, as in this case, was not that the information was confidential but rather that the information had economic value to the victims of the schemes. In *United States* v. *Porcelli*, *supra*, the Second Circuit also *upheld* a mail fraud conviction; the scheme in that case had as its object the avoidance of state sales taxes.

In *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977), the court reversed the defendants' convictions for violating the National Stolen Property Act by bringing pre-Columbian artifacts from Mexico to the United States without the permission of the Mexican government. In the passage relied upon by petitioner (Pet. 17-18), the court merely explained that the artifacts were not "stolen" within the meaning of the Act because the Mexican government at that time was merely regulating the export of the artifacts but had not yet declared its ownership of them. 545 F.2d at 1000-1003. The meaning of the mail fraud statute was not at issue.

In *United States* v. *Murphy*, 836 F.2d 248 (6th Cir.), cert. denied, 109 S. Ct. 307 (1988), the court reversed a mail fraud conviction based on a scheme to submit false information to the State in order to obtain a bingo license. While the court in *Murphy* held that the State's right to accurate information was an "intangible right" outside the scope of the mail fraud statute, there was no indication in that case that the information had any economic value to the State. In this case, in contrast, the CTRs had economic value to the IRS because they served to uncover information that would be useful in collecting taxes.

quirements of 31 U.S.C. 5313.[5] Since the new statute provides a direct means of prosecuting money laundering offenses, it will no longer be necessary to prosecute money launderers indirectly under other statutes. Thus, the issue whether a money laundering scheme comes within the reach of the mail fraud statute is largely "made academic by the new law." *United States* v. *Herron*, 825 F.2d at 56.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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[5] 31 U.S.C. 5324 (Supp. V 1987) now provides:

> No person shall for the purpose of evading the reporting requirements of Section 5313(a) with respect to such transaction –
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

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